Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

David Roemer,

Petitioner,

v.

Board of Education of the City School District of the City of New York,

Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

David Roemer, *pro se*
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QUESTIONS PRESENTED

1. Whether judges of the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit in dismissing petitioner's lawsuit acted so irrationally as to undermine confidence in federal courts because the respondent prosecuted patently fraudulent, illegal, and malicious disciplinary charges against the petitioner in order to subvert an agreement to conciliate a disagreement about teaching methods.

2. Whether the lower courts erred in ruling that New York Education Law § 3020-a(5) does not deprive tenured teachers of equal protection of law and due process of law in violation of the Constitution of the United States of America in that it limits the grounds for appealing decisions rendered in disciplinary hearings to grounds that apply to voluntary arbitration and not the grounds found in common law and codified in the laws of New York State.

PARTIES

The petitioner here and the plaintiff-appellant below is David Roemer. The respondent here and the defendant-appellant below is the New York City Department of Education ("DOE").

Herbert Monte Levy, Esq., and the Public Employment Relations Board of New York State ("PERB") were defendants but were not defendants-appellees and are not respondents. Mr. Levy is a private attorney that I retained to represent me in a related lawsuit in the supreme court of New York State that preceded the lawsuit in the District Court.

Tom Pappas, who was a former chief of staff of the United Federation of Teachers ("UFT"), is not a respondent because I never served a summons on him. Mr. Pappas is identified as a defendant in the orders of the District Court and the Second Circuit.[1]

Joyce Coppin, who was a former superintendent of Brooklyn high schools, is not a respondent because I never served a summons on her. Mrs. Coppin is named as a defendant in the report and recommendation of the magistrate judge, but not in the order and memorandum of the district judge.

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[1] I served this petition upon a law firm affiliated with the UFT.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

Preliminary Statement 1

State Court Proceedings 4

Proceedings in the Lower Federal Courts 5

Reasons for Granting Petition 6

A Prima Facie Case Was Made For Fraud 6

Irrationality of the Disciplinary Panel 7

Inapplicability of Contract Law 10

Summonses Were Not Served on Coppin and Pappas. 11

Constitutionality of Education Law § 3020-a(5) 11

CONCLUSION 13

APPENDIX A: Report and Recommendation of J. Gold Dated December 30, 2002 ..... 1a

APPENDIX B: Memorandum and Order of J. Gershon Dated November 6, 2003 ..... 21a

APPENDIX C: Order of J. Gershon Admitting Failure to Read Letter Dated February 3, 2004 ..... 28a

APPENDIX D: Order of Judicial Council Dated December 21, 2004 ..... 29a

APPENDIX E: Order of Second Circuit Filed September 23, 2005 ..... 31a

APPENDIX F: Denial of Rehearing Dated February 2, 2006 ..... 34a

TABLE OF AUTHORITIES

Abramovitch v. Board Education Central School District No.1 Towns Brookhaven and Smithtown, 1979.NY.40741, ¶ 23, 386 N.E.2d 1077, 46 N.Y. 2d 450, 414 N.Y.S. 2d, 109 (1979) (VersusLaw), reh'g denied 46 N.Y. 2d 1076, 416 N.Y.S. 2d, 1029, cert. denied 444 U.S. 845, 100 S. Ct. 89 10

Board of Education of Carlsbad Municipal Schools v. Harrell, No. 20,856, 1994.NM.40160, ¶¶ 97, 98, 118 N.M. 470, 882 P.2d 511 (N.M. 1994) (VersusLaw) 13

State of Alaska v. Public Safety Employees, No. 3642, File No. S-3291, 1990.AK.183, ¶ 40, 798 P.2d 1281 (Alaska 1990) (VersusLaw) 13

Thompson v. City of Louisville, et al. 362 U. S. 199 (1960) 13

Vargas v. City of New York, Docket No. 03-7311, 2004.C02.0000835, ¶ 24, 377 F.3d 200 (2d Cir. 2004) (VersusLaw) 4

Education Law § 3020-a(3)(c)(ii) 10

Education Law § 3020-a(4)(b) 10

Education Law § 3020-a(5) i

OPINIONS BELOW

The report of United States Magistrate Judge Steven Gold is reprinted as Appendix A and is reported at 2002 U.S. Dist. LEXIS 27118. The order of the United States District Judge Nina Gershon is reprinted as Appendix B and is reported at 290 F. Supp. 2d 329, 2003 U.S. Dist. LEXIS 20163. An order by J. Gershon reprimanding me is reprinted as Appendix C. A decision of the Judicial Council of the Second Circuit is reprinted as Appendix D. The order of the Second Circuit is reprinted as Appendix E and the denial of my petition for a rehearing is reprinted as Appendix F.

JURISDICTION

The judgment of the Second Circuit was entered on September 23, 2005. A petition for a rehearing en banc filed on October 3, 2005, was denied on February 23, 2005. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). Since 28 U. S. C. § 2403(b) may apply, notification has been given to the New York Attorney General.

STATEMENT OF THE CASE

Preliminary Statement

On February 23, 2001, I filed a *pro se* complaint with 58 paragraphs against the DOE, PERB, and Mr. Levy. On May 24, 2001, I filed an affidavit in support of a motion for summary judgment in my favor and against the defendants (*see* footnote at p. 2a) with 84 exhibits, labeled 1 to 84. On June 1, 2001, I filed an amended complaint adding Mrs. Coppin and Mr. Pappas as defendants. The following is a summary of the paragraphs in the amended complaint. The defendants did not answer my allegations, but only argued that my lawsuit was precluded by prior litigation. All the quotations are from the exhibits:

Paragraphs 1 to 3: As a result of changes in 1994, Education Law § 3020-a(5) violates the constitutional due process and equal protection rights of tenured teachers because it does not allow

appeals of decisions made by disciplinary panels on the grounds given in Article 78 of the New York Civil Practice Law and Rules.

Paragraphs 4 to 6: I began teaching in 1984, and I was a tenured teacher at high schools operated by the DOE in Brooklyn. In September 1994, I was appointed to Edward R. Murrow High School, where I taught a course titled Regents Physics. At the new school my supervisors rated my lessons as unsatisfactory.[1]

Paragraph 7: On November 4, 1994, the UFT requested conciliation over the "approach that should be used in the teaching of physics" because "His [Roemer's] observations have been critical because of a lack of developmental lesson plan" (Exhibit 13). This request was made pursuant to a provision in the collective bargaining agreement titled "Professional Conciliation" (Exhibit 15). On December 2, 1994, the DOE sent a letter to Mrs. Coppin accepting the request to conciliate "on behalf of the teachers at Edward R. Murrow" and saying "A conciliator will be assigned if you are unable to get the parties to agree" (Exhibit 14).[2]

Paragraph 8: On May 29, 1995, I filed a grievance according to procedures in the collective bargaining agreement against Mrs. Coppin and my supervisors for improperly threatening "to file charges against me for incompetence in a 3020a procedure in violation of our agreement to conciliate" (Exhibit 19).

Paragraphs 9 to 15: I was given a teaching program in Regents Physics for the 1995–1996 school year.[3] On January 16,

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[1] In the disciplinary hearing referred to below, I testified as follows: "He [Roemer] suggests that the pass rate for those students taking the Physics Regents in 1993–94 was 60 percent and in 1995–96 was 65 percent; while in 1994–95 the only full year he taught Physics in Murrow it was 70 percent." (Page 31 of Exhibit 45)

[2] In my approach to teaching, I distributed a handout that explains the science concepts students are expected to learn and that contains questions, problems, and activities to be worked on in class. (Exhibit 35)

[3] The Assistant Principal of Supervision for Science in an observation report dated June 13, 1995, said: "You have made it clear by your comments that the

1996, Mr. Pappas told me "the Grievance Committee of the AdCom [Administrative Committee] has decided to remand this grievance (Case #13511) back to Professional Conciliation" (Exhibit 29). On February 29, 1996, the DOE assigned me to nonteaching duties.

Paragraphs 16 and 17: On November 20, 1996, the members of the board of the DOE voted publicly that there was probable cause for charges that were filed against me pursuant to Education Law § 3020-a. The charges were itemized in a 24-page document (Exhibit 32) that was unlawful and fraudulent because the document omitted any reference to the pending grievance and the agreement under Professional Conciliation. The specification of charges also omits any reference to a disciplinary letter (Exhibit 26) from Mrs. Coppin saying, "I will recommend that steps be taken to prefer charges against you." Attached to this letter was a response written by me (Exhibit 28). Another common law element of fraud is the representation that I had undergone proper and standard remediation for poor teaching.

Paragraphs 18 to 23: Attorneys from the DOE and UFT selected Howard Edelman, Esq., to be the hearing officer.[4] Mr. Edelman brokered a settlement of the charges according to which I gave up my permanent civil service appointment to Edward R. Murrow High School, accepted a transfer to another school, and agreed to be suspended without pay for two months (Exhibit 41).

Paragraphs 24 to 29: On June 13, 1997, Mr. Edelman violated my constitutional right to due process of law by conducting the first of seven hearings even though the case was settled.[5] On June 1, 1998, a report (Exhibit 45) written by Mr.

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supervisory suggestions given to you during your year at Murrow are not useful" (Exhibit 21).

[4] Mr. Edelman was on a list of arbitrators maintained by the American Arbitration Association.

[5] In my brief to the District Court opposing the motions to dismiss, I argued that the DOE did not implement the settlement out of animus against me for criticizing the DOE in a letter published in the New York Times on September 5, 1994, and in testimony at a public hearing of the State Education

Edelman with the concurrence of another panelist said I should be terminated from my position with the DOE. The third panel member decided I should be transferred to another school with no other penalty (Exhibit 46).

Paragraphs 30 to 58: These paragraphs recount my efforts to vacate the decision terminating me through the appeal procedure set forth in Education Law § 3020-a(5) and other lawsuits.

State Court Proceedings

In my briefs and pleadings to the District Court and the Second Circuit I argued that I did not get a full and fair opportunity to litigate in state courts because of misconduct by my own attorneys and by the DOE's attorneys. The litigation in state courts began with an Article 75 petition (Exhibit 47) filed by Mr. Levy's predecessor that sets forth only irrational and trivial claims in violation of the Official Compilation of Codes, Rules and Regulations of New York State (22 NYCRR 1200.33).

On June 7, 2004, I filed a motion asking the Second Circuit to disqualify the DOE's attorneys for making misrepresentations to state courts. The DOE's attorneys did not file a response to my allegations. The panel of judges assigned to rule on my appeal denied this motion on August 19, 2005.

The standard of review required in the Second Circuit for a District Court's dismissal on the pleadings is de novo.[6] In this case, the Second Circuit begins its opinion (*see* page 32a) with the following quote from a prior case:

> We may affirm [the dismissal] on any ground with support in the record, even if it was not the ground relied on by the District Court.

My interpretation of the Second Circuit's order (Appendix E) is that it relied entirely upon the preclusive effect of the

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Department that was published by the American Educational Research Association on February 2, 1995.

[6] *Vargas v. City of New York*, Docket No. 03-7311, 2004.C02.0000835, ¶ 24, 377 F.3d 200 (2d Cir. 2004) (VersusLaw).

disciplinary hearing held under Education Law § 3020-a and not on the defective state court proceedings, which were relied upon by the District Court.

Proceedings in the Lower Federal Courts

After J. Gold wrote a report (Appendix A) saying that my lawsuit should be dismissed, I retained C. W. Isley, Esq., who wrote the document I filed titled "Plaintiff's Objections to Report and Recommendation of Hon. S. Gold, U.S. Magistrate Judge, Dated December 30, 2002." [7]

On November 6, 2003, J. Gershon adopted J. Gold's report (Appendix B). On November 26, 2003, Mr. Isley wrote a motion and memorandum of law asking for reconsideration pursuant to local rules of the District Court.

On December 15, 2003, I wrote a 4-page letter to J. Gershon telling her as respectfully as I could that she did not understand the case and that I wanted the opportunity to explain it to her in person.[8] My request was refused.

On January 27, 2004, I filed a 28-page letter to J. Gershon listing 17 misleading statements in J. Gold's report and 10 irrational statements in Mr. Edelman's report.[9]

On January 28, 2004, J. Gershon denied my motion for reconsideration.

On February 3, 2004, J. Gershon signed an order (Appendix C) saying that she did not read the 28-page letter because it came across her desk after she denied my motion for reconsideration.

On March 12, 2004, I filed a notice of appeal, written by Mr. Isley, with the Second Circuit naming Mrs. Coppin and Mr. Pappas as defendants.

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[7] This document is at pp. A92–148 of the appendix submitted to the Second Circuit.

[8] This letter is at pp. A237–240 of the appendix.

[9] This letter is at pp. A242–269 of the appendix.

On April 15, 2004, I filed a judicial conduct complaint against J. Gold, which was dismissed on December 21, 2004 (Appendix D).

On September 23, 2005, a panel of Second Circuit judges issued an order (Appendix E) that affirmed J. Gershon's dismissal of my complaint.

On October 3, 2005, I filed a petition for an en banc rehearing. The Second Circuit denied the petition on February 23, 2006 (Appendix F).

On March 31, 2006, I filed a motion with the Second Circuit to vacate its order of September 23, 2005, on the grounds that the DOE's attorneys deceived the District Court and the Second Circuit by claiming they represented Mrs. Coppin. On April 20, 2006, I filed a motion to expedite this motion and on May 4, 2006, sent a letter asking about the status of the motion. The DOE's attorneys did not file a response. As of July 7, 2006, the Second Circuit has not denied or granted the motion or returned my motion papers to me.

Reasons for Granting Petition

A Prima Facie Case Was Made For Fraud

On p. 33a the Second Circuit states:

> We note in passing that plaintiff's claim that the 3020a proceeding was tainted by fraud fails, as he proffers only bald allegations of the alleged fraud.

I pled the allegation of fraud in accordance with Rule 9(b) of Fed. R. Civ. P. by listing the common law elements of the fraud.

It is apparent that the members of the board of the DOE were tricked into believing there was just cause to terminate me because the specification of charges made my case seem like a typical case of teacher incompetence. Why else did the members of the board of the DOE vote to spend about $100,000 to terminate me when the disagreement about teaching could have been resolved by the provisions of Professional Conciliation or the lawful grievance that I filed and that was still pending? The grievance I filed against Mrs. Coppin prior to her filing of

disciplinary charges against me was a professional and appropriate response to the breach of the agreement under Professional Conciliation.

This was not a typical case of teacher incompetence except insofar that a principal of a school was unreceptive to an innovative approach to teaching that a teacher learned about in workshops and seminars. In the case at hand, the agreement under Professional Conciliation had the effect of protecting the DOE's investment in workshops and seminars provided to its teachers to improve teaching methods.

I believe that Mrs. Coppin, Mr. Pappas, and staff attorneys employed by the DOE filed the charges against me to avoid having my grievance against Mrs. Coppin resolved by the Chancellor's office. The UFT initially refused to appeal the grievance to the Chancellor, as it has the right to do. However, Mr. Pappas did not uphold this decision (*see* Paragraphs 9 to 15 above), but did nothing to prevent the charges from being filed.

Irrationality of the Disciplinary Panel

On page 32a the Second Circuit says:

> Roemer's claims against the DOE (and, therefore, Choppin [sic], a DOE superintendent) fail under the doctrine of collateral estoppel. Collateral estoppel, also termed issue preclusion, applies to administrative adjudications, including 3020-a hearings. See *Burkybile v. Bd. of Educ. of Hastings on Hudson Union Free Sch. Dist.*, 411 F.3d 306, 310–12 (2d Cir. 2005)

The following quotation from Mr. Edelman's report sheds light on why he terminated me, and also explains why the minority panel member said I should be transferred to another school without any additional penalty. The excerpt begins with a 5-paragraph quotation from my testimony at the disciplinary hearing and ends with a 1-paragraph statement from Mr. Edelman:

"The first step would be to try to identify exactly the difference between what I was doing in the class and what they wanted me to do or what the other teachers were doing or what I was doing – at Midwood.

"It's not at all clear exactly – what I mean, it's not clear in my mind exactly what the difference was between what I was doing in Midwood and what I was doing at Murrow. To me I was just adding things, but that would be the first step, to see if we could resolve that.

"Then the second thing would have been, since we were all agreed that the best lesson is the ones where there's the most amount of student participation, maybe by tests at the end of the period or having people observe the activities of the students.

"And the third level that it could have been conciliated would be by comparing the test scores my kids got with the test scores that other teachers got.

"And if we had gone through these steps and these processes, it might have been possible for us to resolve our – differences."

(emphasis added 539–540)

Respondent's last comment is most significant. It indicates he would have been willing to modify his practice only if the administrators were willing to accept some or all of his views about teaching. While this may be a genuinely conciliatory attitude, it affords no basis for us to conclude that were Respondent returned to duty he would

> conform to the requirements imposed by his administrators.[10]

Not being an educator, Mr. Edelman did not understand that my supervisors and I disagreed only about teaching Regents Physics, not courses in general science. Many more students take general science classes than Regents physics. At my former high school, for example, there was one class of Regents Physics and about 50 classes of general science. This is why Mrs. Coppin and I were able to settle our differences by my transferring to another school. It was understood that I would be teaching only general science.

The following quotation from Mr. Edelman's report shows that he was aware of Mrs. Coppin's mistakes:

> The Panel agrees with Respondent's [Roemer's] contention that those comments go beyond the Superintendent's role as a conciliator. The directive, to "accept the principal's position," though couched as a recommendation, is not a conciliatory gesture but is rather the imposition of a requirement. Thus, we find, the conciliation process at Dr. Coppin's level was not properly conducted.[11]

The only mention made of Professional Conciliation in the summation of the DOE's attorney to the panel was vulgar:

> Mr. Mazzariello: You know what he can do with the conciliation process. I would tell but Mr. Edelman would yell at me.
>
> The Hearing Officer: I will.
>
> Mr. Mazzariello: I could tell him what to do with it. I'd really like to tell him man to man, face to

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[10] Page 48 of Exhibit 45.

[11] Page 44 of Exhibit 45.

> face on the sidewalk in the middle of the street what he could do with that conciliation process.[12]

Judging from his report, Mr. Edelman did not consider what motivated Mrs. Coppin to negatively interfere with the conciliation process and what motivated her to cause disciplinary charges to be filed against me. Mr. Edelman was unaware of the fact that my grievance against Mrs. Coppin was unresolved and only considered whether or not my supervisors were sincere in their opinion that my students were not learning.

Inapplicability of Contract Law

On page 33a the Second Circuit states:

> Roemer's due process claim also fails. His only possible claim is based upon an unsigned stipulation, which states that it "shall not be binding until all final signatures are affixed hereto." The stipulation is not signed by any defendants. Roemer argues that the defendant's failure to abide by the stipulation (and not terminate him) violated his due process rights. But this argument contradicts the terms of the putative agreement, which never became effective.

Education Law § 3020-a(4)(b) requires boards of education to implement the hearing officer's decision. Since the settlement was negotiated in the pre-hearing conferences mandated by Education Law § 3020-a(3)(c)(ii), it was given to the DOE in lieu of the decision and the DOE was bound by law to implement it. In *Abramovich v. Board of Education*,[13] a teacher who was terminated after resuming teaching duties pursuant to a settlement of prior disciplinary charges was deemed to have waived his rights under Education Law § 3020-a.

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[12] Page 14 of Exhibit 44.

[13] *Abramovitch v. Board Education Central School District No.1 Towns Brookhaven and Smithtown*, 1979.NY.40741, ¶ 23, 386 N.E.2d 1077, 46 N.Y. 2d 450, 414 N.Y.S. 2d, 109 (1979) (VersusLaw), reh'g denied 46 N.Y. 2d 1076, 416 N.Y.S. 2d, 1029, cert. denied 444 U.S. 845, 100 S. Ct. 89.

Summonses Were Not Served on Coppin and Pappas

The initial complaint I filed named only the DOE, PERB, and Mr. Levy as the defendants. Upon reflection, I realized that Mr. Pappas and Mrs. Coppin were the individuals primarily guilty of deceiving the members of the board of the DOE into thinking there was probable cause for my termination. Mrs. Coppin and Mr. Pappas, however, were not responsible for the failure of the DOE to implement the settlement. I amended the complaint naming them as defendants but did not serve a summons upon them. Nonetheless, a law firm affiliated with the UFT wrote a letter to the District Court saying it represented Mr. Pappas, and the DOE's attorneys claimed that it represented Mrs. Coppin.

If Mrs. Coppin and Mr. Pappas knew that they were defendants in this lawsuit and authorized the DOE's lawyers and the UFT's lawyers to respond as they did to my lawsuit, Mrs. Coppin and Mr. Pappas were guilty of replicating the dishonest conduct I am accusing them of in this lawsuit. As mentioned above, I brought this to the attention of the Second Circuit on March 31, 2006.

Constitutionality of Education Law § 3020-a(5)

The Commissioner of Education for New York State wrote a memorandum disapproving of a 1994 bill that changed New York Education Law § 3020-a(5):

> Eliminating the Commissioner's authority to review sec. 3020-a panel decisions and limiting judicial review to Article 75 of the CPLR will, as a practical matter, mean that the arbitrator's decision will be final and virtually unreviewable. There is no review on the merits of an arbitrator's decision under CPLR sec. 7511, which will mean that the arbitrator's decision will be final unless it is affected by fraud, partiality or procedural defects. This contrasts with the current standard for judicial review of sec. 3020-a decisions under Article 78 of the CPLR, as articulated in Pell v.

> Board of Education, 34 NY2d 222 (1974). Under this standard, a court has the authority to review sec. 3020-a decisions on the merits and may overturn the penalties imposed in such decisions if they are so arbitrary and capricious as to be 'shocking to the conscience' of the Court. The Commissioner's current review powers are even broader and provide substantial protection of the public, since the Commissioner may substitute his judgment for that of the hearing panel. If this bill is enacted, neither the Commissioner nor the courts will be in the position to act in the public interest to overrule an arbitrator's decision, no matter how erroneous or outrageous that decision is.[14]

Numerous high courts across the land have held that where arbitration is compulsory in nature a lack of meaningful judicial review under state law violates the constitutional guarantee of procedural due process. According to the New Mexico Supreme Court:

> We agree that due process, together with separation of powers considerations, requires that parties to statutorily mandated arbitration be offered meaningful review of the arbitrator's decision. In order for review of the arbitrator's decision to be meaningful, the court must determine whether the litigant received a fair hearing before an impartial tribunal, whether the decision is supported by substantial evidence, and whether the decision is in accordance with law. The provision...limiting judicial review of the arbitrator's decisions to cases "where the decision

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[14] From Kathy A. Ahearn, Esq., Counsel and Deputy Counsel for Legal Affairs of the State Education Department, addressed to Counsel to the Governor, dated August 2, 1994, pp. 4–7.

> was procured by corruption, fraud, deception or collusion" does not permit meaningful review of the arbitrator's decision by the court. We therefore strike this provision as a violation of due process of law and as an unconstitutional delegation of judicial power.******The scope of review constitutionally required for compulsory arbitration is the review required for administrative adjudications.[15]

The forgoing is in accord with the Supreme Court of Alaska:

> Compulsory arbitration is different. The parties have not agreed voluntarily to accept reduced possibilities of appellate review in order to resolve their dispute swiftly. It is by operation of law that the parties are denied their usual right to have their disputes resolved by the courts. Therefore, a standard of review higher than gross error is appropriate.[16]

Non-probationary or non-provisional civil servants in New York are allowed an Article 78 review when they are dismissed after an administrative law judge (not just a labor arbitrator) makes an arbitrary and capricious decision or one not supported by substantial evidence. An Article 78 review is a codification of a common law right.

CONCLUSION

The petition for a writ of certiorari should be granted because this case is more demanding of judicial supervision than *Thompson v. Louisville.*[17] In this case, Thompson was convicted

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[15] *Board of Education of Carlsbad Municipal Schools v. Harrell*, No. 20,856, 1994.NM.40160, ¶¶ 97, 98, 118 N.M. 470, 882 P.2d 511 (N.M. 1994) (VersusLaw).

[16] *State of Alaska v. Public Safety Employees*, No. 3642, File No. S-3291, 1990.AK.183, ¶ 40, 798 P.2d 1281 (Alaska 1990) (VersusLaw).

[17] *Thompson v. City of Louisville, et al.* 362 U. S. 199 (1960)

of "loitering and disorderly conduct" with no evidence supporting the charge. This court reversed the conviction upon certiorari to the City Police Court of Louisville. In the present case, the charges against me were fraudulent and the court affirming my termination as a public school teacher is a United States Court of Appeals.

APPENDIX A: Report and Recommendation of J. Gold dated December 30, 2002

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DAVID ROEMER, Plaintiff,

- against -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD, HERBERT MONTE LEVY, JOYCE COPPIN, and TOM PAPPAS, Defendants.

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Introduction

David Roemer, proceeding pro se, brings this action pursuant to 42 U.S. C. §§ 1983, 1985(3) and 1986, contending that defendants violated his constitutional rights to due process and freedom of speech and association. Roemer's claims arise from defendant Board of Education's decision to terminate his employment as a New York City high school physics teacher and his subsequent challenges to his termination. In this action, he seeks reinstatement, back pay, compensation for emotional damages, reimbursement of legal fees, and punitive damages. See Third Amended Compl. ¶¶3, 59.

The defendants named by Roemer in his Third Amended Complaint are the Board of Education of the City of New York ("Board of Education"), his former employer; the Public Employment Relations Board ("PERB"), a state executive agency responsible for administering the New York Public Employees' Fair Employment Act; Herbert Monte Levy, a private attorney Roemer contends he retained to represent him in challenging his termination; Joyce Coppin, the Superintendent of Brooklyn High Schools during plaintiff's employment; and Tom Pappas, Secretary and Chief of Staff of the United Federation of Teachers ("UFT"), plaintiff's union at the time of his termination. See Third Amended Compl. ¶ 2. Each of these defendants has moved to dismiss or for summary judgment, while plaintiff seeks leave

to file a Fourth Amended Complaint.[1] The Honorable Nina Gershon has referred the parties' motions to me for report and recommendation. For the reasons stated below, I respectfully recommend that defendants' motions be granted, that Roemer's motion for leave to file a Fourth Amended Complaint be denied, and that this action be dismissed in its entirety.

Facts

The following facts are drawn from plaintiff's Third Amended Complaint, referred to below as the complaint ("Compl.").[2] I assume the allegations of the complaint to be true for purposes of the pending motions. Because defendants' motions are based in large part upon the prior proceedings surrounding plaintiff's termination, those proceedings are described below in some detail. Plaintiff was originally hired by defendant Board of Education to teach high school physics in 1984. Roemer voluntarily transferred to Edward R. Murrow High School in September, 1994, where his teaching methods were observed by the Principal and an Assistant Principal and found to be unsatisfactory. Compl. ¶¶ 4-6. In response, Roemer, through his union, invoked a conciliation procedure available under the terms of his collective bargaining agreement. Compl. ¶ 7. On May 29, 1996, Roemer filed a grievance, alleging that his supervisors were not complying with the conciliation procedures set forth in that agreement. Compl. ¶ 8. Plaintiff's grievance was denied by defendant Coppin, acting on behalf of the Board of Education, on October 6, 1995. Compl. ¶ 10. Although plaintiff's

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[1] Plaintiff has also filed motions for summary judgment and for sanctions. See Docket Entries 21 and 36. During a conference held on June 22, 2001, I ruled that defendants, who at that time indicated their intention to file motions to dismiss, would not be required to respond to plaintiff's summary judgment and sanctions motions unless their dismissal motions were denied, because plaintiff's motions would be rendered moot if defendants' motions to dismiss were granted. See Docket Entries 37, 39.

[2] A copy of the Complaint is annexed as Exhibit A to the Declaration of Michael DeLarco submitted in support of the motion to dismiss filed by defendant Board of Education and Coppin ("DeLarco Decl.").

union agreed to appeal the denial of his grievance, an appeal was never brought. Compl.¶ 11.

On November 20, 1996, the Board of Education found probable cause to file charges of incompetence and insubordination against Roemer. Compl.¶ 16. A hearing officer was appointed, and pre-hearing conferences were held. Compl. ¶19. Roemer, represented by counsel, moved to dismiss the charges pending against him, but his motion was denied. Compl. ¶¶19–21. Hearings were then held before a three-member arbitration panel pursuant to New York Education Law § 3020-a. Plaintiff was represented by counsel throughout the arbitration proceedings, and contested the charges against him on several grounds. Among other claims, plaintiff asserted that his problems with his supervisors resulted from philosophical differences rather than insubordination, and that his approach to teaching was superior to the methodology insisted upon by the Board of Education and thus did not reflect his incompetence. See In the Matter of the Arbitration between Board of Education of the City of New York and David Roemer, Findings and Recommendations at 27–32.[3] After seven days of hearings, on May 12, 1998, a three-member panel issued a detailed written decision finding plaintiff "culpable of the charges preferred against him" and concluding that "[t]he appropriate penalty for Respondent [Roemer]'s culpability is dismissal from service." See id. at 50; Compl. ¶ 26.

On June 24, 1998, plaintiff, represented by counsel, filed a petition with the New York State Supreme Court pursuant to New York CPLR Article 75, seeking to vacate the findings and recommendations of the hearing panel. Compl. ¶ 30. Plaintiff's Article 75 petition challenging the recommendation of termination made by the hearing panel named defendant Board of

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[3] Excerpts from the hearing transcripts and the findings and recommendations of the hearing panel were part of the record on appeal to the Appellate Division in a malpractice action plaintiff brought against defendant Levy in state court, and that record has been submitted to this court in connection with the pending motions. See Docket Entry 54.

Education as the respondent.[4] In his petition, plaintiff challenged the panel's decision to recommend his termination on two procedural grounds as well as on its merits. First, plaintiff asserted that the panel's decision was rendered approximately three weeks after a deadline imposed by the New York State Education Law. See Petition ¶¶ 10, 17–18. Second, plaintiff contended that the panel's recommendation of dismissal could properly have been implemented only at a public meeting of the Board of Education, but that he was advised of his termination by his superintendent five days before the public hearing was held. See Petition ¶¶ 20–21. Finally, plaintiff challenged the merits of the panel's decision as arbitrary, asserting that the panel failed to apply the proper standard when it concluded he was incompetent without first finding that no valid educational experience had taken place in his classroom. See Petition ¶¶ 2.c, 6,12. Plaintiff sought reinstatement to his position as a tenured teacher as well as back pay. See Petition ¶ 2 and p. 7.

Plaintiff alleges that he retained defendant Levy to represent him in connection with his Article 75 proceedings on November 4, 1998, but that defendant Levy withdrew from further representation just two weeks later, on November 18, 1998. Compl. ¶ 32. Plaintiff's Article 75 petition was dismissed on December 10, 1998, by Kings County Supreme Court Justice David B. Vaughan. Compl. ¶ 35. It appears that Justice Vaughan did not issue a written opinion explaining the reasons for his decision. See Docket Entry 54 at 201. Plaintiff appealed Justice Vaughan's decision, but the dismissal of his petition was affirmed by the Appellate Division, Second Department on January 18, 2000. See DeLarco Decl. Ex. D; Compl. ¶ 41.

On April 13, 2000, Roemer filed an improper practice charge before defendant PERB, alleging that the UFT had conspired with the Board of Education to file false and fraudulent disciplinary charges against him. Compl. ¶42. PERB dismissed plaintiff's charge on May 1, 2000, and rejected plaintiff's

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[4] Plaintiff's Article 75 Petition is annexed as Exhibit D to the DeLarco Declaration.

challenge to its decision to dismiss his charge on August 7, 2000. Compl. ¶¶ 44, 47. In its decision, PERB concluded that all but one of plaintiff's claims were untimely, and that plaintiff's sole timely claim was unsupported by any facts indicating that the UFT's conduct was arbitrary or undertaken in bad faith. See DeLarco Decl., Ex. B.

On August 21, 2000, Roemer filed a petition in New York State Supreme Court pursuant to New York CPLR Article 78 seeking to vacate PERB's decision. Compl. ¶ 49. Plaintiff filed his Article 78 pro se, naming PERB, the UFT, and the Board of Education as respondents.[5] In his petition, plaintiff contended that the UFT conspired with the Board of Education to lodge false disciplinary charges against him. See Article 78 Petition, ¶¶ 4, 42, 48–52, 116, 122. Plaintiff sought reinstatement, back pay and reimbursement of legal expenses. See Article 78 Petition ¶ 5. Plaintiff's petition was heard by Justice Vaughan, who ordered that it be dismissed on November 9, 2000, apparently without issuing a written decision. See DeLarco Decl. Ex C; Compl.¶ 51. Although he had the right to do so, plaintiff never appealed from Justice Vaughan's decision. See New York CPLR § 5701.[6]

On May 24, 2000, plaintiff brought a civil action in New York Supreme Court asserting a claim of legal malpractice against defendant Levy. Compl. ¶ 53. Plaintiff's claims were dismissed by New York County Supreme Court Justice Marsha L. Steinhardt on August 9, 2000. Compl. ¶ 54. The decision dismissing plaintiff's malpractice claim was affirmed by the Appellate Division, Second Department, on February 20, 2001. Comp. ¶ 57.

Discussion

I. Subject Matter Jurisdiction

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[5] Plaintiff's Article 78 Petition is annexed as Exhibit B to the DeLarco Declaration.

[6] Although CPLR §5701(b)(1) provides that interlocutory orders entered in Article 78 proceedings are not appealable as of right, a party does have the right to appeal a final judgment rendered in an Article 78 proceeding pursuant to § 5701(a)(1). See Siegal, Practice Commentaries, C5701:6.

Defendants first seek dismissal pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, asserting that the Rooker-Feldman doctrine precludes this Court from exercising subject matter jurisdiction over plaintiff's claims. The Rooker-Feldman doctrine provides that a federal district court lacks jurisdiction to review a final judgment of a state court. See District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482, 103 S.Ct. 1303, 1315 (1983). The doctrine applies not only to direct appeals from state court rulings, but also to federal claims which are "inextricably intertwined" with the merits of a state court judgment. Id., 460 U.S. at 486, 103 S.Ct. at 1317. Defendants contend that the federal claims plaintiff asserts in this action are "inextricably intertwined" with the arbitration and state court proceedings in which plaintiff has already challenged his termination.

Courts have not yet developed a clear test for determining when a federal claim is "inextricably intertwined" with the merits of a state court judgment. See, e.g., Phifer v. City of New York, 289 F.3d 49, 55–56 (2d Cir. 2002). However, the Second Circuit has held that the Rooker-Feldman doctrine "is at least coextensive with the principles of res judicata ("claim preclusion") and collateral estoppel ("issue preclusion")," and thus bars the exercise of federal jurisdiction not only when "the precise claims raised in a state court proceeding are raised in the subsequent federal proceeding" but also where "subsequent litigation ... would be barred under the principles of preclusion." Moccio v. New York State Office of Court Administration, 95 F.3d 195, 198–200 (2d Cir. 1996). The Circuit has also favorably cited Justice Marshall's formulation, which holds that a federal claim in inextricably intertwined with a state court judgment if it may succeed "only to the extent that the state court wrongly decided the issues before it." Phifer, 289 F.3d at 56, quoting Pennzoil Co. v. Texaco, Inc., 481 U. S. 1, 25, 107 S.Ct. 1519, 1533 (1987) (Marshall, J., concurring); Hachamovitch v. DeBuono, 159 F.3d 687, 694 (2d Cir.1998)(same). Although the Circuit has acknowledged that "[a] case might arise that would directly challenge a state court judgment in a way that the

Supreme Court clearly envisioned would be barred by Rooker-Feldman and yet for some reason not be precluded," it has not yet extended the scope of the Rooker-Feldman doctrine beyond the minimum specified in Moccio. See Phifer, 289 F.3d at 56–57 (emphasis added); see also Hachamovitch, 159 F. 3d at 696, n.3; Harris v. New York State Department of Health, 202 F. Supp.2d 143, 158 et seq. (S.D.N.Y 2002)(discussing in extensive detail the principles underlying the Rooker-Feldman doctrine and the relationship of the doctrine to the rules of preclusion).

Collateral estoppel precludes subsequent litigation "if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." Moccio, 95 F.3d at 200, quoting Colon v. Coughlin, 58 F. 3d 865, 869 (2d Cir. 1995). See also Phifer, 289 F.3d at 56. A decision rendered in an Article 78 proceeding may be given preclusive effect. See Moccio, 95 F.3d at 201–02. Under New York law, res judicata and collateral estoppel apply as well to arbitration awards, even where the award had not be confirmed pursuant to Article 75. See, e.g., Waverly Mews Corp. v. Waverly Stores Associates, 294 A.D. 2d 130, 132, 741 N.Y.S.2d 826, 827 (1st Dep't 2002); Allstate Insurance Co. v. Vega, No. 3873 CVN 1999, 2000 WL 33595799 (New York City Civil Ct., July 16, 2000). It follows as a matter of logic that res judicata and collateral estoppel would also apply to a court order rendered in an Article 75 proceeding. Thus, to determine whether the Rooker-Feldman doctrine, at least as construed in Moccio, bars the exercise of this court's jurisdiction, the claims asserted by plaintiff in this action must be compared with those he litigated in his arbitration proceeding, his Article 75 and Article 78 petitions, and his malpractice action against defendant Levy.

The findings and recommendations of the arbitration panel plainly demonstrate that the panel members considered plaintiff's challenges to the charges proffered against him by the Board of Education, yet found those charges to be supported by ample evidence and sufficiently serious to warrant the termination of plaintiff's employment. Plaintiff's Article 75 petition sought to

vacate the panel's findings and recommendations, asserting that the arbitration panel exceeded its authority, misconstrued controlling law, and rendered an arbitrary decision. See Article 75 Petition, ¶2. These contentions were necessarily rejected by Justice Vaughan, who dismissed plaintiff's petition, and by the Appellate Division, which affirmed Justice Vaughan's decision.

Plaintiff's Article 78 Petition sought an order reversing PERB's dismissal of his unfair labor practices charge. Although the underlying proceedings before PERB apparently concerned the failure of the UFT to represent plaintiff properly, plaintiff's Article 78 petition was in essence yet another attack on the validity of the charges of incompetence and insubordination brought by defendant Board of Education. See, e.g., Article 78 Petition,¶¶ 83–85. The petition also complained that the UFT refused to provide plaintiff with legal assistance he requested, id., ¶110, and that the UFT did so because it had maliciously conspired with the Board of Education to file the false charges he sought to contest in the first place. See id., 110, 116, 122. These arguments were also necessarily rejected by Justice Vaughan, who dismissed plaintiff's petition.

In his Third Amended Complaint, plaintiff invokes the Fourteenth Amendement and 42 U.S.C. §§ 1983, 1985(3). See Compl. ¶ 3. The complaint does not, however, assert any specifically enumerated causes of action or specifically identify any particular claims, nor does it make clear which claims are being asserted against each defendant. Instead, the complaint contains a series of allegations, some of which appear to be factual in nature, and some of which appear to assert claims that plaintiff's rights have been violated. Mindful of the duty to construe a pro se complaint liberally, see, e.g., Platsky v. Central Intelligence Agency, 953 F.2d 26, 28 (2d Cir. 1991), I have attempted to discern the nature of plaintiff's claims by reviewing the allegations of his complaint. Having completed that review, it is clear that the claims plaintiff seeks to assert in this action are essentially the same as those which were decided against him in the arbitration hearing and prior state court proceedings.

Plaintiff's complaint alleges that defendant Board of Education violated his right to due process by transferring him out of the classroom without basis (¶ 13); by doing so in retaliation for plaintiff's attempt to appeal to the Chancellor from defendant Coppin's denial of a grievance he had filed (¶ 14); by failing to complete the conciliation process before filing disciplinary charges against him (¶ 18); and by filing charges of incompetence and insubordination against him which were false (¶¶ 16–17). Plaintiff also claims that the UFT, which is not named as a defendant in the complaint, conspired with the defendant Board of Education in the filing of false and fraudulent charges against him (¶42). Plaintiff asserts that defendant PERB violated his rights by denying him the right to file an amended unfair practices charge (¶ 45) and dismissing his original charge without a hearing (¶48). There do not appear to be any claims in the complaint asserted specifically against defendants Coppin or Pappas. Presumably, plaintiff seeks to hold these defendants liable for their actions of behalf of the Board of Education and the UFT, respectively.

Although they are not named as defendants in this action, plaintiff further alleges that the members of the arbitration panel which found the charges against him to be substantiated and recommended his termination violated his due process rights. Plaintiff's allegations in this regard include a claim that the panel improperly failed to dismiss the charges against him even though they were false (¶ 22), and improperly failed to find in his favor after the hearing was concluded (¶28). In his prayer for relief, plaintiff seeks reinstatement to his position as a tenured teacher, back pay, and reimbursement for legal expenses — the same relief he sought in his State Court petitions — as well as damages for emotional distress and punitive damages.

The facts of this case are similar to those at issue in Moccio. Plaintiff Moccio was a court officer employed by the New York State Office of Court Administration. Disciplinary charges were lodged against him, and after challenging the charges at an administrative hearing and on appeal to an administrative judge, Moccio was terminated. Moccio sought to vacate the

administrative judge's decision by filing an Article 78 petition, but his termination was upheld by the state court. Moccio then commenced a federal action pursuant to Section 1983, claiming that his due process rights were violated by the arbitrary and capricious decision to terminate him, and that his equal protection rights were violated because officers guilty of more serious misconduct were not charged or terminated. See Moccio, 95 F.3d at 197–98.

Although noting that Moccio had not raised in his Article 78 petition the precise constitutional claims asserted in his federal action, the Second Circuit nevertheless held that Rooker-Feldman precluded the exercise of subject matter jurisdiction over Moccio's federal constitutional claims. The Court reasoned that Moccio's due process and equal protection claims were premised upon his contention that his termination was arbitrary and capricious and without rational basis, and that this precise contention was rejected in the Article 78 proceeding. See id. at 200–01.

Each of the claims plaintiff Roemer asserts in his Third Amended Complaint against the Board of Education and PERB, and implicitly against Pappas and Coppin, is, like the claims in Moccio, in essence a challenge to the validity of the disciplinary charges lodged against him. To succeed on his substantive due process claims, plaintiff would be required to show that defendants infringed upon his property interests in an arbitrary and or irrational manner. See, e.g. Harlen Associates v. Inc. Village of Mineola, 273 F.3d 494, 503 (2d Cir. 2001).[7] The

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[7] It is not clear whether plaintiff contends that his procedural due process rights were violated. In any event, having had the opportunity to challenge the basis for his termination at an extensive evidentiary hearing and in successive petitions before the New York Supreme Court, plaintiff may not now credibly claim a violation of his procedural due process rights. See, e.g., Liberty Cable Co., Inc. v. City of New York, 60 F.3d 961, 964 (2d Cir. 1995); cert. denied, 516 U.S. 1171, 116 S. Ct. 1262 (1996) (holding that "[a] party's due process rights are not violated when [he] may participate fully in an administrative agency proceeding and later seek state-court review"); Motefusco v. Nassau County, 39 F. Supp. 2d 231, 239–40 (E.D. N.Y. 1999) (holding that the procedural rights set forth in New York Education Law § 3020-a, which were

validity of the charges filed against plaintiff, however, has already been sustained by an arbitration panel. The arbitration panel found that the charges of insubordination and incompetence were properly lodged, substantiated by the evidence, and sufficient to warrant plaintiff's dismissal. Although plaintiff challenged the panel's findings and recommendations in New York State Supreme Court, his challenge was dismissed. Moreover, with the exception of his claims for emotional distress and punitive damages, plaintiff seeks the same relief in this action that he sought, but failed to obtain, in his two state court petitions. See Harris, 202 F.Supp.2d at 165 (finding Rooker-Feldman applicable by examining the remedies plaintiff sought in his federal action, and observing that success on the federal claims would result in "granting [plaintiff] essentially the same relief he failed to obtain" from the state court) and at 168 (holding that decision in Article 78 challenge to license revocation "precisely embodies the issues of fact and law" raised by plaintiff's substantive due process claim). Thus, the claims in plaintiff's federal complaint described above could not be sustained without upsetting the decision of the arbitration panel, or concluding that the New York State Supreme court erred when it dismissed plaintiff's Article 75 and Article 78 petitions. Accordingly, this Court lacks subject matter jurisdiction over these claims pursuant to Rooker-Feldman.[8]

Although he is not named in the complaint, New York State Supreme Court Justice Vaughan is also alleged to have violated the plaintiff's due process rights. According to the complaint,

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afforded to Roemer in this case, are more than adequate to satisfy a party's procedural due process rights).

[8] Plaintiff's claim that the Board of Education lodged charges against him in retaliation for his attempt to appeal an issue to the Chancellor might arguably survive the Rooker-Feldman analysis in the text; it is not clear whether plaintiff presented this claim during the arbitration hearing or in support of his Article 75 petition. Moreover, plaintiff suggests in his memorandum in opposition to defendant's pending motions that he seeks to file an amended complaint, expanding his claims of First Amendment retaliation. Plaintiff's retaliation claims are discussed in greater detail below.

Justice Vaughan deprived plaintiff of due process by dismissing his Article 75 petition, thereby depriving plaintiff of a remedy to which he was entitled (¶ 36); by not requiring defendant Board of Education to respond to a Reply Affidavit plaintiff submitted (¶37); and by presiding over and dismissing plaintiff's Article 78 Petition even after plaintiff had filed a letter of complaint against him (¶¶50–52). To the extent these allegations are intended to suggest that the state court proceedings were so flawed as to preclude application of the Rooker-Feldman doctrine, the suggestion must be rejected. First a party may not trigger an obligation to recuse simply by suing or filing a grievance against a judge presiding over his case. See, e.g., Jemzura v. Public Service Commission, 961 F.Supp. 406, 411 (N.D.N. Y. 1997); Jones v. City of Buffalo, 867 F.Supp. 1155, 1162 (W.D.N.Y. 1994). Moreover, Rooker-Feldman provides that a federal court lacks jurisdiction over a challenge to a state court decision, even if the state court's actions are alleged to be unconstitutional. See Hachamovitch, 159 F.3d at 694.

The final paragraphs of plaintiff's complaint concern defendant Levy. Plaintiff's only claim against Levy appears to be that Levy's withdrawal from representation forced plaintiff to proceed with his Article 75 petition without counsel, which plaintiff contends violated his due process rights (¶ 32). Plaintiff's state court action against Levy for malpractice was dismissed by New York Supreme Court Justice Steinhardt.[9] It is hard to imagine any allegations a former client might make against his privately retained attorney which would be insufficient to state a claim of professional malpractice but adequate to assert a violation of constitutional rights. Justice Steinhardt's ruling, and the Appellate Division's decision affirming it, therefore preclude this Court from exercising jurisdiction over plaintiff's federal cause of action against Levy in this case. Even if jurisdiction were not lacking under the Rooker-Feldman doctrine, plaintiff's

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[9] Justice Steinhardt's decision is reproduced at pages 3–5 of the Record on Appeal in plaintiffs state court action against defendant Levy. See Docket Entry 54.

claim against Levy would have to be dismissed for failure to state a claim. The only conduct attributed to defendant Levy in plaintiff's complaint is that Levy, two weeks after being retained as private counsel in a civil matter, withdrew from further representation of plaintiff. This allegation clearly fails to state a violation of a constitutionally protected right.

Plaintiff's constitutional claims against each of the defendants may succeed only if the state court decision described above were wrongly decided. Accordingly, with the exceptions discussed below, I respectfully recommend that plaintiff's Third Amended Complaint be dismissed for lack of subject matter jurisdiction pursuant to the Rooker-Feldman doctrine.[10]

II. Constitutional Challenge to New York State Education Law 3020-a

Roemer contends in his complaint that New York State Education Law §3020-a is unconstitutional because it requires teachers to seek review of adverse arbitration decisions pursuant to New York CPLR Article 75, thus depriving them of the broader scope of review available under CPLR Article 78. See Compl. ¶ 3. Although the precise nature of his constitutional challenge is not apparent from his complaint, Roemer argues in his memorandum of law in opposition to defendants' motions that the statue violates the due process and equal protection rights of teachers. See Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss the Third Am. Compl. ("Pl. Mem."), pp. 17–21.

The Rooker-Feldman doctrine does not preclude a general challenge to the constitutionality of a state court statute or rule. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483, 103 S.Ct. 1303, 1316 (1983); Fariello v. Campbell, 860 F.Supp. 54, 66 (E.D.N.Y. 1994). However, plaintiff does not seek a declaratory judgment holding Section 3020-a unconstitutional in his prayer for relief. It therefore appears that plaintiff has failed to state a proper general challenge to the constitutionality of the

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[10] Because I recommend dismissal pursuant to the Rooker-Feldman doctrine, I do not reach defendants' alternative related arguments based upon collateral estoppel.

statute. See Phifer, 289 F.3d at 59, n. 4. In his opposition memorandum, however, plaintiff suggests that he will seek leave to add a claim for declaratory judgment holding Section 3020-a unconstitutional. For the reasons set forth below, plaintiff's proposed declaratory judgment claim would be futile, and his implicit application for leave to amend his complaint to add it should therefore be denied. See, e.g., Jones v. New York State Division of Military and Naval Affairs, 166 F.3d 45, 50 (2d Cir. 1999)(holding that "a district court may properly deny leave when amendment would be futile").

Due process requires notice and an opportunity to be heard before the deprivation of a constitutionally protected significant property interest. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985). Tenure as a public employee is a property interest protected by the constitution. See Gilbert v. Homar, 520 U. S. 924, 928–29, 117 S.Ct. 1807, 1811 (1997)(citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578, 92 S.Ct. 2701, 2709–2710 (1972)). To comport with due process, a "[t]enured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" prior to termination. See Loudermill, 470 U.S. at 546, 105 S.Ct. 1495. The holding in Loudermill rested in part upon the opportunity for a full post-termination hearing. See id.

Education Law § 3020-a provides even more procedural protections than due process requires. The statute entitles an employee to a written statement of any charges lodged against him, including a statement of the potential penalties associated with the charges. See Section 3020-a(2)(a). Although the employee may be suspended before a hearing on the charges is held, the suspension must be with pay, unless the employee has pleaded guilty to or been convicted of certain felonies. See Sections 3020-a(2)(b). If the employee seeks a hearing, he is entitled to one before a neutral hearing officer and, under certain circumstances, before a panel of three hearing officers. See Sections 3020-a(2)(c); 3020-a(3)(b)(iv). The employee may seek

pre-hearing discovery and, at the hearing, has the right to be represented by counsel, to subpoena witnesses, to cross-examine adverse witnesses, and to testify or not as he chooses. See Section 3020-a(3)(c)(i),(iv). All testimony is taken under oath and transcribed, and the employee may decide whether the hearing is privately held or opened to the public. See Section 3020-a(3)(c)(ii). Once the hearing is concluded, the hearing officer is obliged to render a written decision within a specified time, including findings of fact, conclusions, and a statement of what penalty, if any, should be imposed. See Section 3020-a(4)(a). These procedures are more than sufficient to meet the requirements of due process. See Montefusco v. Nassau County, 39 F.Supp.2d 231, 239–40 (E.D.N.Y. 1999).

Before amendments made in 1994, Section 3020-a permitted a teacher to appeal a hearing officer's decision pursuant to CPLR Article 78. See McKinney's 1994 Session Laws of N.Y., vol. 1, ch. 691, § 3020-a (1994). The amended statute retains the right to an appeal, but requires that any appeals be taken pursuant to CPLR Article 75, Section 7511. See Section 3020-a(5). As plaintiff points out, the grounds for vacating or modifying an arbitration award pursuant to CPLR Article 75 are somewhat narrower than the grounds which may be raised in an Article 78 proceeding. Compare CPLR § 7511 with CPLR § 7803. It appears that this difference, and plaintiff's assertion that other city employees may have the right to bring Article 78 proceedings if they are dismissed, forms the basis of plaintiff's equal protection challenge.

Because dismissed New York city schoolteachers are not a "suspect class," the statute plaintiff challenges on equal protection grounds must be afforded deferential "rational basis" review. See Malley v. Fernandez, No. 91-Civ-5635, 1992 WL 204359, at * 5–6 (S.D.N.Y. Aug.10, 1992). When applying this standard, "a court need only identify plausible reasons that may have prompted the legislature to enact the statute in question ...whether or not these plausible reasons in fact underlie the legislative decision." Id. In light of the unusually broad range of procedural rights afforded any teacher facing disciplinary charges

provided by Section 3020-a and, in particular, the extensive rights afforded a teacher who seeks a hearing, it is plainly reasonable to limit a teacher's right to appeal an adverse hearing decision to the same scope of review generally applicable in actions seeking to challenge arbitration awards.

For these reasons, it would be futile to seek a declaratory judgment finding Section 3020-a unconstitutional. I therefore respectfully recommend that, to the extent plaintiff seeks to amend his complaint to seek a declaratory judgment, his motion for leave to amend be denied.

III. First Amendment Retaliation Claims

As noted above, plaintiff alleges in his amended complaint that he was removed from teaching responsibilities in retaliation for seeking to bring an appeal to the New York City Schools Chancellor from defendant Coppin's denial of a grievance he had filed. See Comp. ¶ 14. Because it is not clear that plaintiff presented this claim to the arbitration panel or in his state court petitions, it is at least arguable that, under the limited construction of the Rooker-Feldman doctrine in Moccio, this court has subject matter jurisdiction over this aspect of plaintiff's complaint. Moreover, construed liberally, the allegation arguably states a First Amendment claim cognizable under Section 1983.

Assuming this court were to construe plaintiff's allegation as a First Amendment retaliation claim and were to exercise subject matter jurisdiction over it, the claim would nevertheless be subject to dismis[illegible]. First, the claim is time-barred. Federal civil rights claims brought in New York federal courts are subject to a three-year limitations period. See, e.g., Jackson v. Suffolk County Homicide Bureau, 135 F.3d 254, 256 (2d Cir. 1998); Lounsbury v. Jeffries, 25 F.3d 131, 133 (2d Cir. 1994); Baker v. New York City, 934 F. Supp. 533, 534–35 (E.D.N.Y. 1996). The period begins to run when the plaintiff knows or has reason to know of the injury which forms the basis of his claim. See, e.g., Pinaud v. County of Suffolk, 52 F. 3d 1139, 1156 (2nd Cir. 1995); Veal v. Geraci, 23 F.3d 722, 724 (2d Cir. 1994); Baker, 934 F. Supp at 535. Plaintiff asserts that the action taken by defendants in retaliation for his attempt to appeal to the Chancellor was his

removal from the classroom. Compl. ¶ 14. Plaintiff contends that he was removed from the classroom on February 29,1996. Compl. ¶ 12. Plaintiff filed his original complaint in this action on February 23, 2001, more than three years after he was removed from the classroom. Plaintiff makes no allegation that it was only at some later point, within the limitations period, that he had reason to know of the connection he alleges between his attempt to appeal to the Chancellor and the Board's decision to remove him from the classroom. Accordingly, plaintiff's First Amendment claim is time-barred.

Even if it were not time-barred, plaintiff's First Amendment retaliation claim would be subject to dismissal. To state a claim of First Amendment retaliation, a plaintiff must allege that he engaged in speech involving a matter of public concern, and that his speech was a substantial or motivating factor in his employer's decision to terminate him. See Hellstrom v. U.S. Dep't of Vet. Affairs, 201 F.3d 94, 97 (2d Cir. 2000). In contrast, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of personnel decision taken by a public agency allegedly in reaction to the employee's behavior." See Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690 (1983). According to plaintiff's complaint, the speech at issue here did not even take place: plaintiff asked the UFT to appeal the denial of his grievance to the Chancellor, but the UFT declined. See Compl. ¶ 11. Moreover, plaintiff's grievance concerned the manner in which his supervisors were evaluating his own teaching methods and imposing discipline upon him, which were matters of private rather than public concern.

Finally, even if a plaintiff is able to show that protected First Amendment activities may have been a factor in his termination, a defendant employer may overcome liability by demonstrating that the plaintiff would have been terminated even absent his protected speech. See Hellstrom, 201 F.3d at 97, citing Lewis v. Cowen, 165 F.3d 154, 162–63 (2d Cir.); cert. denied, 528 U.S.

823, 120 S.Ct. 70 (1999). In this case, the Board of Education's allegations of insubordination and incompetence have been extensively reviewed by an arbitration panel, and have been found sufficient to justify plaintiff's dismissal. Plaintiff's Article 75 Petition challenging the panel's decision was dismissed. An adequate independent basis for plaintiff's termination has therefore already been established. For all these reasons, I respectfully recommend that plaintiff's retaliation claim be dismissed.

In his memorandum of law in opposition to defendant's motions to dismiss, plaintiff points to additional instances of speech he now claims may have resulted in adverse employment consequences. More specifically, plaintiff asserts that a letter he wrote on August 22, 1994, and testimony he gave on January 24, 1995, may have caused the Board of Education to reject a settlement of disciplinary charges it had filed against him. Plaintiff also contends that statements he made at a meeting on January 16, 1996, led to his removal from his classroom on February 29, 1996. See Pl. Mem., pp. 28–31.

As noted above, plaintiff filed his original complaint in this action on February 23, 2001. Plaintiff was removed from his classroom on February 29, 1996. The Board of Education rejected the settlement agreement referred to by plaintiff on or before May 2, 1997. See Docket Entry 26, Plaintiff's Aff. in Supp. of Mot. For Summ. Judgmnt., ¶ 44 (Docket Entry 26). Accordingly, plaintiff's new allegations of protected speech are also time-barred. I therefore respectfully recommend that, to the extent the cited portion of plaintiff's memorandum of law may be construed as a motion for leave to amend, the motion be denied.

IV. Plaintiff's Application to Add a Claim for Injunctive Relief and to Name Four PERB Officials as Defendants

In his opposition memorandum, Roemer states that he seeks leave to file a Fourth Amended Complaint adding four PERB officials as defendants. It appears plaintiff seeks to sue these defendants for their participation in PERB's dismissal of his unfair practices charge. Plaintiff also seeks to add a claim for an

injunction, requiring PERB officials to "investigate and resolve" his unfair practices charges. See Pl. Mem., p. 44.

For the reasons discussed above, pursuant to the Rooker-Feldman doctrine, this Court lacks subject matter jurisdiction over plaintiff's complaints about the conduct of PERB. Moreover, plaintiff's claims against PERB must fail for a second reason: they are barred by the Eleventh Amendment. The Eleventh Amendment bars federal suits against state agencies absent a waiver of sovereign immunity. See, e.g., Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984); Jones v. N.Y.S. Div. of Military and Naval Affairs, 166 F.3d 45, 49 (2d Cir.1999). PERB is an agency of the government of the State of New York. See New York Civil Service Law § 205(1). To the extent plaintiff seeks to amend his complaint to assert claims against PERB officials in their official capacity, these claims would be deemed simply another way of suing New York State, and would be barred by the Eleventh Amendment as well. See, e.g., Hafer v. Melo, 502 U. S. 21, 25, 112 S.Ct. 358, 361–62 (1991).

The Eleventh Amendment does not bar suits against public officials sued in their individual capacities. See id. However, it appears that plaintiff's proposed claims against the PERB officials he seeks to sue involve their role in adjudicating his unfair practices charge. Because they were functioning essentially as judges, these individuals would likely be entitled to absolute immunity from claims for damages brought against them in their individual capacities. See Cleavinger v. Saxner, 474 U.S. 193, 200, 106 S. Ct. 496, 500 (1985)(noting that absolute immunity has been extended to those "who perform functions closely associated with the judicial process," including hearing examiners and administrative law judges); Austern v. Chicago Board Options Exchange, Inc., 898 F. 2d 882, 886(2d Cir. 1990)(extending full immunity to arbitrators based upon the "'functional comparability' of the arbitrator's role... to that of his judicial counterpart").

Plaintiff suggests that his proposed amendment would seek an injunction requiring PERB officials to "investigate and

resolve" his unfair practices charge. The Eleventh Amendment does not preclude a claim for prospective injunctive relief intended to halt state action which violates federal constitutional rights. See Pennhurst, 465 U.S. at 102, 104 S. Ct. at 909; Kostok v. Thomas, 105 F.3d 65, 68–69 (2d Cir. 1997). However, plaintiff does not any where explain why he is constitutionally entitled to an "investigation" of his unfair practices charge. Moreover, to the extent plaintiff seeks a different resolution of that charge than the one he has already obtained from PERB and unsuccessfully challenged in his Article 78 petition, his claim would plainly be precluded by Rooker-Feldman. For all these reasons, plaintiff's motion to amend his complaint to add a claim for injunctive relief and to name four PERB officials as defendants should be denied.

Conclusion

For the reasons stated above, I respectfully recommend that the motions to dismiss brought by defendants New York City Board of Education of the City School District of New York, Public Employment Relations Board, Herbert Monte Levy, Joyce Coppin, and Tom Pappas be granted, that plaintiff's motions for summary judgment, for sanctions, and for leave to file a Fourth Amended Complaint be denied, and that this case be closed. Any objections to the recommendations made in this Report must be filed with the Clerk of the Court and the Chambers of the Honorable Nina Gershon within ten days of receiving this Report and Recommendation and, in any event, no later than January 24, 2003. Failure to file timely objections may waive the right to appeal the District Court's Order. See 28 U.S.C. § 636(b)(1); Fed R. Civ. P. 6(a), 6(e), 72; Small v. Secretary of Health and Human Serv., 892 F.2d 15, 16 (2d Cir. 1989).

APPENDIX B: Memorandum and Order of J. Gershon dated November 6, 2003

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DAVID ROEMER, Plaintiff,

- against -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD, HERBERT MONTE LEVY, and TOM PAPPAS, Defendants.

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Plaintiff objects to the Report and Recommendation of the Honorable Steven M. Gold, magistrate judge, recommending that the third amended complaint be dismissed and that leave to file a fourth amended complaint be denied. I have therefore reviewed the Report and Recommendation under the *de novo* standard of review as required by Rule 72(b) of the Federal Rules of Civil Procedure. Based upon that review, Judge Gold's recommendations are adopted.

Subject Matter Jurisdiction

Under Judge Gold's painstaking analysis of the *Rooker-Feldman* doctrine, *District of Columbia Court of Appeals v. Feldman*, 461 U.S. 462 (1983), *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), with which I agree, most of the claims in this case must be dismissed for lack of subject matter jurisdiction.

Constitutional Challenge to New York State Education Law § 3020-a

One of the claims not precluded by the *Rooker-Feldman* doctrine is plaintiff's proposed challenge to the constitutionality of New York State Education Law § 3020-a. Plaintiff claims that, insofar as that statute limits review of arbitration decisions to New York CPLR Article 75 proceedings, rather than giving teachers the broader review of an Article 78 proceeding, it violates due process and equal protection of the laws. As Judge Gold found, any proposed declaratory judgment claim — there is none in the existing pleading — would be futile and therefore

plaintiff's "implicit application for leave to amend his complaint to add it should be denied."

Plaintiff's argument that "heightened scrutiny" should apply is contrary to applicable law; Judge Gold correctly applied the rational basis standard of equal protection review. As Judge Gold found, dismissed New York City schoolteachers are not a suspect class, and "it is plainly reasonable to limit a teacher's right to appeal an adverse hearing decision to the same scope of review generally applicable tin actions seeking to challenge arbitration awards." RR at 17. In sum, plaintiff's argument that a dismissed teacher is limited to Article 75 Review fails to state a due process or equal protection claim.

Claims Against Plaintiff's Former Attorney, Herbert Monte Levy

Plaintiff now agrees to the dismissal *without prejudice* of defendant Levy. For the reasons stated by Judge Gold, the claims against defendant Levy will be dismissed, with prejudice, both under the *Rooker-Feldman* doctrine and because, in any event, they fail to state a claim.

Plaintiff's Claims Against PERB and Application to File a Fourth Amended Complaint to Name Four PERB Officials as Defendants and to Seek Injunctive Relief

Plaintiff now agrees to the dismissal, again *without prejudice*, of his claims against PERB. However, for the reasons stated by Judge Gold, those claims will be dismissed with prejudice, and plaintiff's application for leave to file a fourth amended complaint expanding on his allegations regarding PERB is denied.

First Amendment Retaliation Claims

Judge Gold recommended that these claims (the one set forth in the amended complaint and the additional ones described in plaintiff's memorandum in opposition to summary judgment, *see* RR at 20) be dismissed as time-barred and, alternatively, on the merits.

Regarding time-bar, Judge Gold was correct that each of the claims plaintiff referred to is time-barred. Plaintiff now asserts the continuing violation theory and argues that his termination, as

to which his complaint is timely, is merely the culmination of a continuing series of First Amendment violations. To begin with, the continuing violation theory will not suffice to make timely the First Amendment violation alleged in the third amended complaint or the additional claims in plaintiff's memorandum before Judge Gold. The Supreme Court has recently held that the continuing violation doctrine does not permit untimely claims for discrete acts, as opposed to hostile work environment claims, even where they are related to a timely claim. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 106–115 (2002).

Even if plaintiff were permitted, at this late date, to add a First Amendment retaliation claim to his various challenges to his termination, it would be futile. Judge Gold addressed a variety of grounds, each of which is contested by plaintiff, as to why plaintiff's First Amendment claims are without merit. It is unnecessary to address each because one ground so thoroughly supports dismissal. As Judge Gold stated, a defendant employer may overcome liability by demonstrating that the employee would have been terminated even absent his protected speech. Judge Gold noted that in this case the Board of Education's allegations of insubordination and incompetence have been extensively review by a statutory arbitration panel and found sufficient to justify plaintiff's dismissal (the lone dissent to the panel's decision, filed by the Employee Panel Member, was not based on a disagreement with the panel's findings; rather the dissenter disagreed with only the recommended punishment); and his Article 75 petition challenging the panel's decision was rejected by the state courts. RR at 19–20.[1]

In *Collins v. New York City Transit Authority*, 302 F.3rd 113 (2d Cir. 2002), the Court of Appeals for the Second Circuit held that, given the probative weight of an arbitration decision, the circumstances of the plaintiff's termination did not support an

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[1] The arbitration panel's findings are part of the Record on Appeal to the Appellate Division in *Roemer v. Levy*, 720 N.Y.S.2d 814 (2d Dep't 2001), which was submitted to this court on the pending motions and will be referred to as the "Arbitration Findings."

inference of either discrimination or retaliation. Here, as in *Collins*, the arbitration panel was an independent panel at which plaintiff was represented by counsel, indeed counsel he himself retained. The panel heard evidence over many days and considered what is essentially the same defense that plaintiff raises here, namely, that his dispute with his supervisors was merely one of philosophy and methodology, for which he could not be disciplined. It is clear from the fifty page decision of the arbitration panel that it fully considered plaintiff's arguments, but based upon overwhelming evidence, rejected them. The panel concluded that Roemer was "culpable of failing to provide adequate aims and summaries in his lessons; of failing to adequately involve students in his lessons; of failing to motivate students in his lessons; of failing to provide appropriate written lesson plans; and of failing to meet with his supervisors concerning the lessons he had taught." *Arbitration Findings* at 43. These conclusions were supported by a detailed analysis of the facts and arguments of the parties to the arbitration. Turning to the question of the proper penalty, the majority of the panel concluded that "the specific facts of this case demand that [plaintiff's] services be terminated." *Arbitration Findings* at 46. This conclusion was based upon the extent of the observations made by plaintiff's supervisors of his class work and his repeated acts of insubordination in refusing to accept suggestions for remediation. The majority found that "this is not a case of a teacher who could improve with additional training. Instead, this is a case of a teacher who simply believed he was right and everyone else was wrong." *Arbitration Findings* at 47; *See Arbitration Findings* at 49.

The arbitration panel expressly found that "none of Bruckner and Cohen's suggestions or observations [Bruckner being the principal and Cohen the assistant principal of the high school where plaintiff was employed], were based on anything but their assessment of his performance." *Arbitration Findings* at 41. The panel further found that:

> "there is nothing in the record to even remotely suggest that Bruckner or Cohen placed

> unreasonable demands upon Roemer. They surely did not conspire to oust him and Roemer acknowledged that he did not regard them as malicious individuals bent on getting him. Instead, the goals they espoused — more student participation, greater responsiveness to students' questions, injecting lessons with aims, motivations, etc., and better use of demonstrations, reflect commonly accepted pedagogical methodology. Thus, [Roemer's] failure to adhere to them renders them culpable of the charges alleging unsatisfactory performance in its various forms." *Arbitration Findings* 41–42.

Plaintiff, in his objections to the Report and Recommendation, argues that it has not be demonstrated that he would have been dismissed absent his protected speech. His principal argument in support of this objections is that Judge Gold improperly applied the doctrine of collateral estoppel, even though Judge Gold expressly declined to address that doctrine on these motions. Plaintiff simply misapprehends the difference between applying collateral estoppel and giving evidentiary weight to the arbitration. *See Collins* at 119.

Plaintiff also argues that it was not determined in the Article 75 proceeding that there was an independent reason to dismiss him. *See* Plaintiff's Objections to Declaration of Michael DeLarco at 31. Plaintiff's arguments do not overcome the principle of *Collins*, and he points to no facts which he has produced or could produce, other than those which he presented to the arbitration panel. His claim that his removal from teaching responsibilities and his dismissal were in retaliation of protected speech amounts to nothing more than a disagreement with the panel's conclusions.

Fully aware that the findings of the arbitration panel, which are expressly referenced in his third amended complaint, were made a part of the record on the motions, and having submitted numerous factual matters himself, plaintiff now complains that Judge Gold should not have considered the facts as to his

dismissal. To begin with, some defendants moved for dismissal under Rule 12 for lack of subject mater jurisdiction and failure to state a claim; defendant Levy expressly moved for summary judgment and provided notice under Local Rule 56.2. Plaintiff's opposition affidavit is described as "Affidavit in Opposition to Motions to Dismiss Under Rules 12(b) and 56;" and sixteen exhibits are attached to it. In addition, his objections to me all recite that they were "prepared with the assistance of counsel." *See e.g.* p. 50 of initial objections. It is clear then that the pro se plaintiff, who himself moved for summary judgment and attached dozens of factual exhibits to his supporting affidavit and submitted a Rule 56.1 statement, was aware of his obligation to produce all available evidence demonstrating a genuine dispute over material facts. *See Sawyer v. American Federation of Government Employees, AFL-CIO*, 180 F.3d 31, 34–36 (2d Cir. 1999); *Corcoran v. New York Power Authority*, 935 F. Supp.376 (S.D.N.Y. 1996).

Rule 12(b) expressly provides that, where a party moves to dismiss for failure to state a claim, and "matter outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Here, as noted, plaintiff did have an opportunity, which he took, to present material outside the pleading, but failed to proffer any evidence, other than the conclusory claim that he was retaliated against, in opposition to the evidence relied upon by the arbitrators. He makes no showing of factual error by the arbitrators, and in his objections again fails to make any demonstration that there are facts which could lead a reasonable fact-finder to reach a conclusion different from that found by the arbitration panel. *See Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972) (upholding dismissal of complaint where plaintiff responded to factual submissions made on a Rule 12 motion but failed to raise a "substantial question of the veracity or completeness of the movant's showing or present [] countervailing facts").

Under all of these circumstances, it is clear that plaintiff, like the plaintiff in *Collins*, eannot show that the arbitration decision was wrong. He has offered no new evidence not before the tribunal, nor any evidence "that the impartiality of the proceeding was somehow compromised." *Collins* at 119. On the contrary, here as in *Collins*, plaintiff "has offered insufficient evidence of causation linking his termination to motives of retaliation.... to overcome the cumulative probative weight of the evidence of a legitimate reason for this discharge and of the final termination decision by the arbitration board," *Id.* As the court in Collins said:

> "[Plaintiff's] termination occurred, therefore, only after a decision, based on substantial evidence, of an undisputedly independent, neutral and unbiased adjudicator that had the power to prevent the termination. This fact is highly probative of the absence of discriminatory intent in that termination." *Id.* at 119.

That the arbitrator did not address the claim of retaliation does not alter this conclusion. *See Brinson v. New York City Transit Authority*, 60 F. Supp. 2d 23, 30 (E.D.N.Y. 1999), *aff'd* 213 F. 3d 625 (2d Cir. 2000) ("[I]t is immaterial that the arbitrator did not consider [plaintiff's] claim of discrimination and instead focused on the misconduct charges"). Put another way, no reasonable jury could find for the plaintiff on the First Amendment retaliation claims.

Conclusion

For the reasons stated by Judge Gold and in the Order, the third amended complaint is dismissed with prejudice, and plaintiff's application for leave to file a fourth amended complaint is denied.

APPENDIX C: Order of J. Gershon Admitting Failure to Read Letter

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DAVID ROEMER, Plaintiff,

- against -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, PUBLIC EMPLOYMENT RELATIONS BOARD, HERBERT MONTE LEVY, and TOM PAPPAS, Defendants.

----------X

On December 4, 2003, plaintiff moved for reconsideration of the court's order dismissing his claims against defendants. Via letter dated December 15, 2003, plaintiff requested oral argument and/or permission to file reply papers in connection with his motion for reconsideration. The court issued an order denying those requests on December 17, 2003. On January 28, 2004 the court denied plaintiff's motion for reconsideration. Plaintiff now submits a letter, Dated January 27, 2004, which was not received by chambers until January 30, 2004 (although it was received by the pro se office on January 27, 2004) purporting to withdraw his request to submit reply papers on the motion for reconsideration and again requesting oral argument on the motion for reconsideration. Despite plaintiff's stated intention to withdraw his request to submit reply papers, and the court's order denying his request to do so, his letter of twenty-eight pages is an obvious attempt to circumvent the Court's Order of December 17, 2003. Plaintiff's letter of January 27, 2004, is therefore in violation of this courts order of December 17, 2003. Further violations may subject plaintiff to sanctions.

SO ORDERED.

s/_____

NINA GERSHON

United States District Judge

Dated: February 3, 2005

APPENDIX D: Order of Judicial Council

In re CHARGE OF JUDICIAL MISCONDUCT
Docket No. 04-8514

On April 15, 2004, the Complainant filed a complaint with the Clerk's Office for the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 351 (formerly § 372(c)) ("the Act") and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (the "Local Rules"), charging a magistrate judge of this Circuit ("the Judge") with misconduct.

Background and Allegations:

The Complainant, the plaintiff in a civil rights action that was referred to the Judge for a report and recommendation, alleges that the Judge improperly failed to recuse himself from the Complainant's case and improperly recommended that his complaint be dismissed. The Complainant alleges that the Judge's report and recommendation unfairly discredited the Complainant in the eyes of the district court judge, created a false impression of the facts of the case, included statements that were false and misleading, and was legally absurd and irrational.

Disposition:

The complaint must be dismissed.

The Complainant is challenging the Judge's actions and decisions in his civil rights proceeding. Direct challenges to the merits of decisions or procedural rulings may not be brought under § 351, however. See 28 U.S.C. § 352 (b) (1) (A) (ii) (formerly § 372 (c) (3) (A (ii)); Local Rule 4 (c) (2); see also Local Rule l(b) (the Act does not cover "wrong decisions—even very wrong decisions—in the course of hearings, trials, or appeals"). Such challenges must be pursued through normal appellate procedures. See Local Rule 1(e) ("The complaint procedure is not intended to provide a means of obtaining a review of a judge's or magistrate judge's decision or ruling in a

case. The judicial council of the circuit . . . does not have the power to change a decision or ruling. Only a court can do that.").

The complaint is therefore dismissed. The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.

s/_____
John M. Walker, Jr.
Chief Judge
New York, New York
December 21, 2004

APPENDIX E: Order of Second Circuit

Filed: September 23, 2005

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of September, two thousand and five.

Present: HON. ROGER J. MINER, and
HON. RICHARD C. WESLEY,
Circuit Judges,
HON. JED S. RAKOFF,
District Judge

DAVID ROEMER,
Plaintiff-Appellant,
- v - (04-2126)
BOARD OF EDUCATION OF THE CITY OF NEW YORK, JOYCE COPPIN, Tom PAPPAS, PUBLIC EMPLOYMENT RELATIONS BOARD, HERBERT MONTE LEVY,
Defendants-Appellees.

Appearing for Plaintiff-Appellant: DAVID ROEMER, *pro se*.
Appearing for Defendants-Appellees:
SCOTT SHORR, Senior Counsel (Michael A. Cardozo, Corporation Counsel, the City of New York Law Department), on behalf of the New York City Department of Education and Joyce Coppin, New York, NY.

JAMES R. SANDNER (New York State United Teachers), on behalf of Tom Pappas, New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Gershon, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court be **AFFIRMED**.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues. Plaintiff *pro se* raises claims against a host of defendants. We analyze plaintiff's various claims in turn. "We may affirm [the dismissal] on any ground with support in the record, even if it was not the ground relied on by the District Court." *Palmer v. Occidental Chem. Corp.*, 356 F.3d 235, 236 (2d Cir. 2004) (affirming the dismissal of a Title VII claim).

At the outset, we note that Roemer does not challenge any aspect of the district court's dismissal as it relates to defendants-appellees Pappas, Levy, or the New York City Public Employment Relations Board. Accordingly, he has waived any challenge to the district court's judgment of dismissal with respect to these defendants. *See, e.g., LoSacco v. City of Middletown*, 71 F.3d 88, 92–93 (2d Cir. 1995). As a result of Roemer's waiver, what remains of his Complaint alleges that the New York City Department of Education ("DOE") denied him due process of the law by holding a hearing under New York Education Law § 3020-a ("3020-a hearings") after entering into a binding stipulation that provided for his continued employment; and that the DOE violated his First Amendment rights by discharging him in retaliation for his invocation of the grievance procedure in the Collective Bargaining Agreement. Roemer also alleges that section 3020-a violates equal protection of the law and due process by forcing tenured teachers to appeal 3020-a hearings via New York CPLR Article 75 instead of Article 78.

Roemer's claims against the DOE (and, therefore, Choppin [sic], a DOE superintendent) fail under the doctrine of collateral estoppel. Collateral estoppel, also termed issue preclusion,

applies to administrative adjudications, including 3020-a hearings. See *Burkybile v. Bd. of Educ. of Hastings on Hudson Union Free Sch. Dist.*, 411 F.3d 306, 310–12 (2d Cir. 2005). In order for preclusive effect to attach to issues or facts adjudicated in administrative proceedings, the otherwise-applicable preclusion rules must be met. *See Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 499–502 (1984). That is to say, an issue must have been raised, litigated, decided, and necessary to the decision issued. *See id.*

Here, Roemer admits in his 28(j) letter that the majority of the panel members presiding over the 3020-a hearing found that he was terminated for cause. That finding rebuts any claim that Roemer's discharge was executed in retaliation for the exercise of any First Amendment right to utilize the grievance process. *Cf. Burkybile*, 411 F.3d at 313 (accepting finding that plaintiff "was terminated for just cause" based on 3020-a hearing). Thus, plaintiff's First Amendment claim fails as a matter of law and was appropriately dismissed. We note in passing that plaintiff's claim that the 3020a proceeding was tainted by fraud fails, as he proffers only bald allegations of the alleged fraud.

Roemer's due process claim also fails. His only possible claim is based upon an unsigned stipulation, which states that it "shall not be binding until all final signatures are affixed hereto." The stipulation is not signed by any defendants. Roemer argues that the defendant's failure to abide by the stipulation (and not terminate him) violated his due process rights. But this argument contradicts the terms of the putative agreement, which never became effective.

We summarily reject Roemer's facial challenge to New York Education Law section 3020-a. Roemer argues that the law denies due process and equal protection of the law. This is clearly not the case. The law sets out the procedures for challenging claims like the ones brought against Roemer and provides all the process due. Further, there is no indication that the law denies equal protection to any class of individuals.

We have considered Roemer's remaining arguments and find them without merit.

Accordingly, for the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

APPENDIX F: Denial of Rehearing

Roseann B. MacKechnie
CLERK

Date:	2/2/06
Docket Number:	04-2126-cv
Short Title:	Roemer v. Board of Education O
DC Docket Number:	01-cv-1105
DC:	EDNY (Brooklyn)
DC Judge:	Honorable Steven Gold
	Honorable Nina Gershon

Filed February 23, 2006

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23 day of FEBRUARY two thousand six.

David Roemer,

Plaintiff-Appellant,

v.

Board of Education of the City School District of New York, Joyce Coppin, Tom Pappas, Public Employment Relations Board, Herbert Monte Levy,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant David Roemer. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.